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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARMCO INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

UNITED STEELWORKERS OF AMERICA, AFL-CIO and its Local 1865,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY OF PETITIONER ARMCO INC. TO BRIEFS IN OPPOSITION

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REPLY OF PETITIONER ARMCO INC. TO BRIEFS IN OPPOSITION

The Board's and OCAW's attempt to paint this case as one involving myriad small disputed judgments about myriad small disputed facts is a smokescreen that fails to conceal fundamental issues fully appropriate for decision by this Court. These issues are neither fact-bound nor unique to this case. They concern the proper influence in bargaining unit determinations of dramatic shifts in economic conditions, of undue leverage for a few hundred employees at the front end of a continuous production process employing thousands of employees, of defunct prior bargaining unit history in failed enterprises, and of decades of legal precedent and consistent industrial practice. In this particular case, the issues concern whether the Board's unit determination can be considered anything but unthinking and arbitrary when it draws no distinction between an independent coke plant, which is failing because it can sell only a small portion of the coke it can produce, and that coke plant, producing virtually at full capacity, as an element of a steel works. In the larger sphere, the issues concern whether in this age of industrial change the Board can properly shape the context of labor-management relationships on the basis of a wooden litany of unit determination criteria which fails to reflect or accommodate entirely new conditions brought about by the sale and acquisition of the particular unit.

In this case, the facts and circumstances which govern these issues are essentially undisputed. The post-acquisition operation of the Ashland Works is the same operation which exists in all other basic steel plants that include coke facilities and which has uni-

formly been recognized, in practice and by the Board, as a single bargaining unit. Thus, all the factors listed at Board Opp. 9 and 14 which are said by the Board to justify a separate unit are essentially the same factors which exist in all the many other basic steel plants that have coke operations, in every one of which coke is part of the larger unit. For example, as pointed out in the petition of United Steelworkers of America in No. 87-1719, at p. 9, n.7, dissimilar skills, duties and working conditions and limited employee interchange are characteristic of many departments of any basic steel plant but are much less persuasive of balkanization than functional integration is hostile to it. It follows that, at its core, the Board's position rests on giving controlling weight to a defunct past bargaining history in contravention of the strictures of §9(c)(5) of the statute and in conflict with the decision of the Seventh Circuit in *NLRB v. Indianapolis Mack Sales & Service, Inc.*, 802 F.2d 280 (1986).

The Board's answer to the "undue leverage" created by its unprecedented balkanization of the Ashland Works is extraordinary. The answer is to require Armco to revert to the open market in coke which Armco had gotten out of when it acquired the Allied plant.[1] Armco's whole purpose in acquiring the Allied plant and integrating it into the steel production process was to avoid open market purchases and stock-

[1] The Board says (Opp. 13): "In any event, the record in this case does not support the suggestion that the coke plant employees could shut down Armco's steel mill operations. Prior to the purchase of the [coke facility], Armco satisfied most of its coke needs through purchases on the open market. There is no reason to believe that it could not do so again."

piling because they are costly and inefficient and the quality of the coke so acquired is erratic and inadequate. The Board does not dispute that this was Armco's purpose, and it does not dispute that it was a legitimate and constructive purpose. Nevertheless the Board, in the interest of fractionalizing bargaining at the Ashland Works, would require Armco to abandon this purpose and revert to the wholly unsatisfactory vagaries of the open market.

This hugely impractical suggestion about the open market is of a piece with the Board's unrealistic statement (Opp. 10) that coke facilities which are part of integrated steel works are " 'nothing more than suppliers of a material used in steelmaking,' " like the Allied plant before the acquisition. The statement is an *ipse dixit* which fails to refute the undeniable fact that Armco has integrated the coke operation into the continuous steel production process, thereby creating the same single bargaining unit which exists in all the other integrated steel works that include coke.

The Board says *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966), upsets the unbroken precedent and practice which require a single unit, including coke, in basic steel operations (Opp. 11, n.4). The Board is wrong. *Mallinckrodt* is not a balkanizing decision that encourages smaller units. It is the opposite ofthat. *Mallinckrodt* overruled *American Potash & Chemical Corporation*, 107 NLRB 1418 (1954), which had unduly exalted the claims of crafts for severance (162 NLRB at 396), except in four "favored" industries, including steel. Thus *Mallinckrodt* swung the pendulum back toward *more favorable treatment of large unit claims*, including consideration of the interests of all the employees in the facility. 162 NLRB at 396.

In the course of this *anti*-balkanization opinion the Board said that all factors should also be examined even in the favored industries, which were not before it. 162 NLRB at 398 n.17. But it did not thereby break up, or even destabilize, the single unit in the favored industries. In fact, the Board justified its ruling that the extant single unit in *Mallinckrodt* was not to be balkanized by equating the functional integration in that case with the functional integration in steel and other favored industries. (162 NLRB at 398).[2]

Following its clear indication in *Mallinckrodt* that it had no intention of actually balkanizing steel, the Board, in the 20 years since *Mallinckrodt*, has *never once* balkanized steel or any of the other favored in-

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[2] The two cases cited by OCAW (Br. 6) to support its contention that this case does not depart from precedent are inapposite. The first, NLRB v. Metal Container Corporation, 660 F.2d 1309 (8th Cir. 1981), upheld a separate craft unit for highly skilled, "production-support" employees. The production employees on the functionally integrated production line remained in a single unit. It has long been recognized in Board law that the special interests of highly skilled craft employees may warrant a separate unit.

The second case, Hamilton Test Systems, N.Y., Inc. v. NLRB, 743 F.2d 136 (2d Cir. 1984), did not involve a Company with an integrated manufacturing operation. Rather, the Company was a service organization with employees scattered in four separate locations. Most of the work was performed on an as-needed basis at the work sites of the Company's customers and most of the employees were on the road and reported to their respective offices only once a week largely for administrative purposes. In short, there is no rational basis to apply the community of interest principles which governed Hamilton Test Systems to the highly integrated production employees at Armco's Ashland Works.

dustries, until it did so in this case. There is not one post-*Mallinckrodt* case in or out of steel that is consistent with the Board's two-unit decision for Armco's fully integrated Ashland Works. *Mallinckrodt* said nothing, and since *Mallinckrodt* the Board has done nothing until this case, to suggest that an appropriate separate coke department unit can exist in an integrated steelmaking facility. Thus, the essence of the Board's decision in this case is gratuitously to declare that factors which for decades have been understood not to balkanize steel may now be cited to balkanize it, all in the interest of allowing the defunct bargaining history to control.

The Board's opposition (at 14, 16) also relies on references to the perspective and expectations of employees in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. ___, 96 L Ed 2d 22, 107 S Ct 2225 (June 1, 1987). But in *Fall River*, in contrast to this case, there was no question of change in the appropriate unit. Leverage was not an issue at all in *Fall River*, much less leverage by a small group of employees over a whole vast productive enterprise of which it had become a part, and over the thousands of employees in that enterprise. Contrary to the last statement in the Board's opposition, *Fall River* did not rule that employees' past bargaining unit status takes precedence over leverage, since leverage and the balkanization of an integrated unit were not issues there. The Board's attempt to apply the reference in *Fall River* to "legitimate expectations in continued representation by their union" (96 L Ed 2d at 38) to the different situation in this case is further proof that the decisions of the Board and the Court of Appeals come down to past bargaining history ov-

erriding the single unit which the integration of the coke facility into the continuous steelmaking process created.

The Board cursorily dismisses (Opp. 15) petitioners' position that the economic realities of this situation must be taken into account to assess correctly the community of interest which determines the appropriate unit question. The Board says that to give "decisive weight" to this factor would undermine §9(b)'s statement that "to assure to employees the fullest freedom in exercising" their statutory rights a less than plant-wide unit is among the permissible choices. But the Board gave the economic realities of the case no weight, much less decisive weight. And the Board's and the industry's long history of single-plant units, including integrated coke operations, in basic steel, shows that the determination has long since been made in the steel industry that the fullest freedom for exercise of employee rights is in a plant-wide unit. That determination was defied in this case and, in consequence, the basic constructive purpose of the coke plant purchase has been upset, undue leverage over steel works operations has been given to a relatively small group of employees, and long-term constructive precedent has been replaced with a new precedent which, if upheld, will discourage job-saving investment in basic steel and other domestic industry.

CONCLUSION

For the reasons stated in the petitions and this reply, the petitions for certiorari should be granted.

Respectfully submitted,

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